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# Righting the Ship: What Courts are Still Getting Wrong About Electronic Discovery

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# RIGHTING THE SHIP: WHAT COURTS ARE STILL GETTING WRONG ABOUT ELECTRONIC DISCOVERY

Tanya Pierce\*

## ABSTRACT

*What happens when law changes but courts and lawyers ignore the changes? On December 1, 2015, amendments to the Federal Rules of Civil Procedure went into effect. One of those amendments includes a sweeping change to Rule 37(e), dealing with the availability of sanctions in federal courts for lost or destroyed electronically stored information (ESI). In the last few years, however, a number of courts have interpreted the amended rule in ways at odds with its plain language and underlying policies, and a surprising number of courts continue to ignore the amended rule altogether. This article examines those trends and recommends ways in which to avoid relegating the amended rule to the same fate as its failed predecessor.*

*Not long after its passage in 2006, experts, courts, and litigants concluded original Rule 37(e) did not work. The rule's language was too vague, and its application was too narrow. Courts and litigants, therefore, routinely ignored the rule, instead relying on courts' inherent authority to order sanctions. Consequently, inconsistent and unpredictable law developed, which caused potential litigants to excessively spend on over-preserving ESI. In 2010, the Civil Rules Advisory Committee (the Committee) unanimously agreed to overhaul original Rule 37(e).*

*After years of study—which included holding numerous hearings and receiving comments from over 2,000 interested parties—the Committee completely replaced the original rule with amended Rule 37(e), a clearer and more broadly applicable rule. One of the amended rule's primary purposes is to promote the development of uniform standards to replace the uncertainty created by the flaws in the original rule. If courts continue to misinterpret or ignore the amended rule, however, this purpose will be undermined, wasting the significant efforts that went into changing the rule.*

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## I. INTRODUCTION

NOT long after the Civil Rules Advisory Committee (the Committee) promulgated original Rule 37(e)—dealing with lost electronically stored information (ESI)<sup>1</sup>—courts and commentators agreed the rule did not work as intended.<sup>2</sup> The original rule was meant to provide a partial safe harbor for lost ESI, but the rule’s language was vague, and its application was narrow. Indeed, the rule’s wording provided limited guidance, and the rule applied only if ESI was lost as a result of the routine operation of a party’s computer system.<sup>3</sup> In other words, the rule covered only some accidental losses, and it did not cover any intentional losses of ESI.

1. Federal Rule of Civil Procedure 34(a)(1)(A) defines ESI as including “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data compilations.” Rapid technological changes make listing all currently existing ESI impossible, but experts have included the following as examples of ESI: “email messages, word-processing files, webpages, and databases that are created and stored on computers, magnetic disks (such as computer hard drives), optical disks (such as DVDs and CDs), and flash memory (such as thumb or flash drives).” RONALD J. HEDGES, BARBARA J. ROTHSTEIN & ELIZABETH C. WIGGINS, *MANAGING DISCOVERY OF ELECTRONIC INFORMATION* 3 (3d ed. 2017).

2. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment; see also Thomas J. Joyce, *Finding Prejudice from Lost ESI: An Analysis of Courts’ Standards Under Amended Federal Rule of Civil Procedure 37(e)*, 71 OKLA. L. REV. 979, 979–80 (2019).

3. See, e.g., *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 642 (S.D. Tex. 2010) (concluding original Rule 37(e), which precluded “sanctions if the loss of information arises from the routine operation of the party’s computer system, operated in good faith,” did not apply where the information was lost as a result of an intentional act).

While the original rule did not prohibit a court from sanctioning a party's conduct that resulted in spoliation<sup>4</sup> of ESI, it also did not authorize a court to impose sanctions for the deliberate destruction or alteration of ESI.<sup>5</sup> This limitation caused litigants and courts alike to regularly ignore the rule. Instead, to order sanctions against nonproducing parties for spoliated ESI or for ESI lost as a result of an accident unrelated to a routine computer operation, courts routinely relied on their inherent authority to manage litigation as authorized.<sup>6</sup>

Unsurprisingly, inconsistent and unpredictable law developed in the federal circuit courts. For instance, courts around the country failed to agree about how to determine when sanctions were warranted, what standards of culpability should apply to different kinds of sanctions, and what types of sanctions should be ordered. This uncertainty spawned inefficiency and waste. Predictably, potential litigants spent excessive time and resources over-preserving ESI to shield themselves from potentially severe sanctions in case they were later sued and the information was no longer available, even though they might not be sued later or, if they were, the ESI might not be subject to discovery.<sup>7</sup>

In light of original Rule 37(e)'s failure to provide guidance in situations involving spoliated ESI, a near universal consensus developed that the rule needed to be revised. Thus, the Committee included original Rule 37(e) among those identified for proposed revisions at the 2010 Duke Litigation Conference. After nearly five years of study, which included holding meetings and receiving public comments, the Committee completely replaced the original rule with amended Rule 37(e), which became effective on December 1, 2015.<sup>8</sup>

The amended rule is broader than the one it replaces.<sup>9</sup> Significantly,

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4. "Spoliation is the destruction or significant alteration of evidence, or the failure to preserve [it] for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999); *see also* HEDGES, ROTHSTEIN & WIGGINS, *supra* note 1, at 43; Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 *CARDOZO L. REV.* 793, 793 (1991) ("Spoliation is the act of destroying or otherwise suppressing evidence in litigation.").

5. *Rimkus*, 688 F. Supp. 2d at 612–13, 642 (discussing when deletion can become spoliation and identifying that the 2006 version of Rule 37(e) did not cover intentional spoliation (citing THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 48 (2d ed. 2007))).

6. *Id.*

7. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment; *see also* Alexander Nourse Gross, *A Safe Harbor from Spoliation Sanctions: Can an Amended Federal Rule of Civil Procedure 37(e) Protect Producing Parties?*, 2015 *COLUM. BUS. L. REV.* 705, 723; Charles Yablon, *Byte Marks: Making Sense of New F.R.C.P. 37(e)*, 69 *FLA. L. REV.* 571, 574–76 (2017).

8. *See* JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4–5 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [<https://perma.cc/5PLB-J6ND>].

9. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment; *see also* Cat3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 495 (S.D.N.Y. 2016) ("The amended rule is much more comprehensive."). *Compare* FED. R. CIV. P. 37(f) (2006), *with* FED. R. CIV. P. 37(e).

the amended rule encompasses intentional spoliation, not just accidental loss of ESI.<sup>10</sup> In broadening the rule, the Committee specifically sought to resolve the circuit split regarding what standards should apply to courts' decisions to impose severe sanctions for lost or spoliated ESI.<sup>11</sup>

The amended rule promotes uniformity over the various approaches that had developed to analyze what, if any, consequences should flow when ESI was lost or destroyed after a duty to preserve it in anticipation of litigation had arisen. Thus, going forward in cases involving ESI lost or spoliated after a duty to preserve in anticipation of litigation had arisen, the Committee contemplated that courts would rely on amended Rule 37(e) for authority to authorize specific remedial actions, to determine whether sanctions were warranted, and to determine what type of sanctions might be appropriate under the circumstances in each particular case—whether those circumstances involved an accidental or an intentional loss of ESI.<sup>12</sup>

Since the amended rule was enacted, however, a number of courts have interpreted the rule in an overly narrow manner, inconsistent with the amended rule's language and at odds with the Committee's stated intent in overhauling original Rule 37(e).<sup>13</sup> The original rule required such a narrow interpretation, but the amended rule does not allow it. Courts interpreting the amended rule in this way incorrectly interpret amended Rule 37(e) when they fail to recognize it is broader than the original rule it replaced.

In addition, a surprising number of courts have ignored the amended rule altogether. Indeed, one commentator has identified over one hundred cases that should have applied amended Rule 37(e) but that failed to mention it at all.<sup>14</sup> While some of those cases were pending when the

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10. See discussion *infra* Part II.A.

11. *Cat3*, 164 F. Supp. 3d at 495.

12. ADVISORY COMM. ON CIVIL RULES, DISCOVERY SUBCOMMITTEE REPORT RULE 37(E) 382 (Apr. 10–11, 2014), in ADVISORY COMMITTEE ON CIVIL RULES (2014), <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2014> [<https://perma.cc/8TSL-C5WY>] [hereinafter SUBCOMMITTEE REPORT RULE 37(E)] (“The proposed rule, moreover, supersedes reliance on inherent power to adopt measures it does not authorize.”). Quite early in the drafting process, the Committee declared its intent for the amended rule to foreclose courts’ reliance on their inherent authority. See, e.g., Advisory Committee on Civil Rules, Meeting Minutes 5 (Nov. 2, 2012) [hereinafter November 2012 Minutes] (“Present Rule 37(e) is limited to regulating sanctions ‘under these rules.’ That limit is discarded in the proposal. The purpose is to make it unnecessary to resort to inherent authority.”). And the intent to supersede reliance on inherent authority survived as reflected in the Committee’s notes submitted with the 2015 Amendment. See FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.

13. See discussion *infra* Part II.A.

14. See generally Thomas Y. Allman, Amended Rule 37(e): Case Summaries, at App. B (May 31, 2018) (unpublished manuscript) (on file with author). The large number of cases is even more surprising given that the rule’s amendments were supposed to generally apply to already pending cases. Although the amended rule did not take effect until December 1, 2015—so it did not automatically apply in cases filed before that date—Chief Justice Roberts’s order transmitting the proposed rule’s amendments to Congress instructed that the rules governed “insofar as just and practicable” to proceedings already pending, as well as those filed after the rule’s effective date. *Cat3*, 164 F. Supp. 3d at

amended rule came into effect, arguably the amended rule should still have applied pursuant to the Supreme Court's instructions.<sup>15</sup> Even more troubling, in a number of the cases filed after December 1, 2015—cases that fit squarely within amended Rule 37(e)'s parameters—courts apply law that predates and that is abrogated by the rule's amendment.

Part II of this article briefly outlines the developments that led to the enactment of original Rule 37(e), the major weaknesses in the original rule, the process that led to its amendment in 2015, the wording of the amended rules, and an analysis of the way in which the amended rule should operate. Part III examines a number of cases implicating amended Rule 37(e), in which courts and litigants either have interpreted it in ways that are at odds with its plain language or that have ignored its existence altogether. Part IV analyzes these developments and provides recommendations aimed at increasing understanding of the amended rule and its application to all cases dealing with ESI lost after a duty to preserve it in anticipation of litigation has arisen. Doing so promotes the development of consistent and predictable standards and enhances the rule's effectiveness in a way that appreciates the tremendous time and effort that went into amending it.

## II. ORIGINAL RULE 37(e) AND ITS LATER AMENDMENT

ESI has grown at a nearly immeasurable rate over the past several decades, as information storage has increasingly migrated from paper and print sources to electronic and digital sources.<sup>16</sup> And experts agree the volume of ESI is virtually always exponentially greater than the volume of information that can be stored in hard-copy.<sup>17</sup> In part, this growth has been spurred by an overwhelming preference for communicating information through email and other electronic formats instead of through printed documents. As a result, individuals, organizations, and companies have the power, the burden, and the challenge of managing their growing collections of ESI. Some of the most daunting challenges include learning

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495–96 (recognizing also that Chief Justice Roberts's order was consistent with the relevant statutory provision, 28 U.S.C. § 2074(a)).

15. See discussion *infra* Part II.D.

16. Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 584 (2001).

17. HEDGES, ROTHSTEIN & WIGGINS, *supra* note 1, at 3; Redish, *supra* note 16, at 584 (observing ESI exists “simultaneously on several very different levels of preservation” as compared to paper copies). Indeed, scholars have written about various ways in which businesses are beginning to deal with an unprecedented volume of data that appears to be increasing at previously unfathomable rates. See, e.g., Agnieszka McPeak, *Disappearing Data*, 2018 WIS. L. REV. 17, 24. One way businesses are coping is by “evolving in the other direction: to create less long-lasting data.” *Id.* at 25. Thus, it is already true that not all electronically created information is stored electronically—or at all. In recent years, ephemeral apps like Snapchat have proliferated, causing some to suggest that “disappearing data will become more common as a fundamental design feature” in certain kinds of electronic information. See *id.* at 19. While the tide of ever-increasing ESI may at some point be stemmed, for the foreseeable future, it is likely the volume of information stored will continue to grow at previously unimaginable rates.

to organize, keep track of, and store massive amounts of ESI.<sup>18</sup>

Compounding these challenges related to ESI volume are challenges related to the nature of ESI itself. Like other forms of evidence, ESI may be lost in a variety of ways—some accidental and some not.<sup>19</sup> Because of its uniquely ephemeral nature, ESI, unlike other forms of evidence, can be lost or destroyed through actions a party may not even realize could result in loss. For example, unlike tangible, hard-evidence—like printed documents—some kinds of ESI can be altered by mere access. Thus, by its nature, ESI is routinely deleted or altered and often before a duty to preserve arises or has become apparent. The characteristics of ESI require parties—more so than in situations involving tangible, physical evidence—to undertake affirmative steps to preserve ESI, lest it be lost.<sup>20</sup>

Further exacerbating these challenges is the extensive discovery of information allowed under the Federal Rules of Civil Procedure. Information is discoverable as long as it is relevant to a dispute, proportional to the needs of the case, and reasonably accessible.<sup>21</sup> Combined with the expansive scope of allowable discovery under the federal rules, the massive volumes of ESI, along with its ephemeral nature, has made responding to discovery requests increasingly complex, time-consuming, and expensive. Together these factors have contributed dramatically to the costs of litigation.<sup>22</sup> Thus, interest in and consternation around lost ESI

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18. Alexandra Marie Reynolds, Note, *Spoliating the Adverse Inference Instruction: The Impact of the 2015 Amendment to the Federal Rule of Civil Procedure 37(e)*, 51 GA. L. REV. 917, 918 (2017).

19. *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 612 (S.D. Tex. 2010).

20. *Id.*

21. Rule 26(b)(1) sets forth the general scope of discovery in federal courts, including the proportionality requirement. *See* FED. R. CIV. P. 26(b)(1). Rule 26(b)(2)(C)(ii) protects parties from having to produce ESI that is “not reasonably accessible.” *See id.* 26(b)(2)(C)(ii); *Hickman v. Taylor*, 329 U.S. 495, 500 (1947) (discovery under the federal rules plays a crucial role in preparing for trial, clarifying the issues, and ascertaining facts relative to the issues). Although broad, however, the scope of discovery is not unlimited. *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141, 154 (2017) (“[E]xplaining that the 2015 amendments to Rule 26(b)(1) ‘abrogated cases’ that applied previous versions of the rule and that the ‘test going forward is whether evidence is ‘relevant to any party’s claim or defense,’ not whether it is ‘reasonably calculated to lead to admissible evidence.’” (quoting *In re Bard IVC Filters Prods. Liab. Litig.*, No. MDL 15-02641-PHX DGC, 2016 WL 4943393, at \*564 (D. Ariz. Sept. 16, 2016))). In addition, technology has developed—and is predicted to continue to develop—that may alleviate those challenges, but that goal has not yet been achieved. *See* Memorandum from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure 13 (May 17, 2010) [hereinafter Kravitz Memorandum] (“There are tentative signs that the continuing rapid advance of technology will begin to use computers to reduce the burdens caused by the exponential growth of computer-based information. Within the last few years, vendors of e-discovery services began to boast that electronic searching had achieved the same level of effectiveness as a first-year associate.”). It has even been suggested that, at some point, “sophisticated search techniques will move beyond any human capacity for physical review, and that this process will overtake any rules developed on even the best possible anticipations.” *Id.*

22. *See, e.g.,* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 569 (2010) (describing challenges and costs associated with ESI in litigation). Another distinguishing and challenging feature of ESI is the

and other e-discovery issues has been growing for some time and shows no sign of stopping.<sup>23</sup>

#### A. 2006 ENACTMENT

As early as 1970, the rules recognized the existence of ESI as reflected in Rule 34's reference to "data compilations."<sup>24</sup> But it was not until 2006, when the Committee adopted original Rule 37(e), that the Federal Rules of Civil Procedure explicitly authorized discovery of ESI.<sup>25</sup> When it adopted the original rule, the volume of information kept in electronic form was already immense. Thus, real concerns existed about the threat of sanctions for accidental or routine loss of ESI.<sup>26</sup> These concerns resulted in unnecessary expenses and the over-preservation of ESI, which the Committee intended to address and alleviate with the adoption of original Rule 37(e).<sup>27</sup>

Original Rule 37(e), thus, comprised a modest "safe harbor" provision meant to protect producing parties from the imposition of sanctions in situations in which ESI was lost due to routine computer functions, such as an automatic deletion that occurred as a result of existing document retention programs.<sup>28</sup> In its entirety, original Rule 37(e) was one sentence: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as the result of the routine, good-faith operation of an electronic information system."<sup>29</sup>

#### B. PROBLEMS WITH 2006 RULE

Although the language of the original rule appeared to protect parties whose mere mistakes resulted in lost ESI, in practice, the rule did not provide much protection. Indeed, several problems with the rule quickly

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ease with which it can be deleted or altered. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 214 (S.D.N.Y. 2003).

23. See, e.g., *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 8 (2018) ("[J]ust as the Second Edition was necessitated by advances in the law and amendments to the Federal Rules of Civil Procedure in December 2006, this Third Edition has been necessitated by an even greater explosion in the volume and diversity of forms of electronically stored information, the constant evolution of technology applied to eDiscovery, and by further amendments to the Federal Rules of Civil Procedure that went into effect in December 2015."); see also Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 791 (2010).

24. FED. R. CIV. P. 34 advisory committee's note to 1970 amendment ("Rule 34 applies to *electronic data compilations* from which information can be obtained only with the use of detection devices." (emphasis added)); *John B. v. Goetz*, 879 F. Supp. 2d 787, 861–62 (M.D. Tenn. 2010).

25. FED. R. CIV. P. 34 advisory committee's note to 2006 amendment; *John B.*, 879 F. Supp. 2d at 862.

26. Steven W. Brookreson, Comment, *37(e): The Effects of Change and a Call for More*, 86 UMKC L. REV. 177, 188 (2017).

27. *Id.*

28. *Cat3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 495 (S.D.N.Y. 2016).

29. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.



became apparent. For one, the rule vaguely referred to “exceptional circumstances” but provided no guidance as to what would qualify as an exceptional circumstance.<sup>30</sup> Thus, despite the seemingly difficult standard to impose sanctions—the existence of exceptional circumstances—court-ordered sanctions were not uncommon.<sup>31</sup>

As early as 2010, some commentators voiced concerns suggesting that e-discovery sanctions were “at an all-time high.”<sup>32</sup> These commentators argued the safe harbor provisions of original Rule 37(e) provided little protection to litigants or to their counsel.<sup>33</sup> For parties seeking refuge from increasing numbers of sanction awards for lost ESI, many argued original Rule 37(e) had not proven to be an effective “safe harbor” after all.<sup>34</sup>

Particularly problematic was the original rule’s application only to ESI lost as a result of unintentional conduct related to routine computer operations and not to ESI lost as a result of other unintentional conduct or as a result of intentional or bad faith conduct.<sup>35</sup> Where behavior in litigation is not regulated by the rules or other applicable law, it is virtually undisputed that courts have inherent authority to manage litigation before them, and that authority includes the power to sanction the conduct of the litigants when necessary.<sup>36</sup> Original Rule 37(e) provided no authority for courts to sanction parties for some kinds of accidental losses and for all kinds of intentional losses. Courts, therefore, had no choice but to rely on other sources of authority to impose sanctions in a variety of cases that

30. See, e.g., Rachel Hytken, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 887 (2008); Nichole D. Wright, Note, *Federal Rule of Civil Procedure 37(e): Spoiling the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 817–18 (2009).

31. See, e.g., Robert Hora & Robert Lindholm, *The New Federal Rules of Civil Procedure: Rule 37(e)—A True Safe Harbor from Spoliation Sanctions?*, MILBANK CLIENT ALERT: LITIG. & ARB. GROUP 2 (Nov. 24, 2015), <http://www.milbank.com/images/content/2/2/v22/22561/client-alert-new-federal-rules-of-civil-procedure.pdf> [https://perma.cc/XHV8-66WL].

32. Willoughby, Jones & Antine, *supra* note 23, at 790–91.

33. *Id.* Indeed, some even noted that courts also relied on sections (a), (b), and (c) of original Rule 37 in ordering sanctions, despite Rule 37(e)’s supposed “safe harbor.” See, e.g., Brookreson, *supra* note 26, at 187–88. *But cf.* Kravitz Memorandum, *supra* note 21, at 14 (“The 2006 amendments have been [in] place for three years and a half. Although they have not assuaged all resentments of e-discovery, they seem to be working well—at least as well as one might reasonably have hoped.”).

34. Brookreson, *supra* note 26, at 190; Hon. James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 SEDONA CONF. J. 613, 615 (2016) (citing Gross, *supra* note 7, at 717–24; Wright, *supra* note 30, at 812–14; Gal Davidovitch, Comment, *Why Rule 37(e) Does Not Create a New Safe Harbor for Electronic Evidence Spoliation*, 38 SETON HALL L. REV. 1131, 1136–40 (2008); Daniel Renwick Hodgman, *A Port in the Storm?: The Problematic and Shallow Safe Harbor for Electronic Discovery*, 101 NW. L. REV. 259, 285 (2007); Mark R. Nelson & Mark H. Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery*, 12 RICH. J.L. & TECH., 14, 47–51 (2006)).

35. See sources cited *supra* note 34.

36. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42–43 (1991) (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *United States v. Hudson*, 11 U.S. 32, 34 (1812)).

were not covered by the original rule.<sup>37</sup>

Over time, a split among the federal circuits developed as to the appropriate standard for imposing sanctions or curative measures on parties who failed to preserve ESI.<sup>38</sup> For example, the Second Circuit, Ninth Circuit, and the D.C. Circuit Courts of Appeals allowed the severe sanction of an adverse inference instruction to be levied for a failure to preserve as a result of gross negligence.<sup>39</sup> In contrast, courts in the Third, Seventh, Eighth, Tenth, and Eleventh Circuits required a showing of willful misconduct or bad faith as prerequisites to ordering an adverse inference instruction.<sup>40</sup>

The original rule's failure to cover a wider array of behaviors that resulted in lost ESI, therefore, undermined the Committee's desire to spare litigants from unnecessarily incurring expenses related to over-preserving ESI. In the face of the significant uncertainties caused by these conflicting standards, litigants who were unable to predict where they might be sued spent excessive resources on preservation efforts to avoid the risk of incurring the kinds of severe sanctions that might result if a court were to find they did not do enough to preserve potentially relevant ESI.<sup>41</sup> Thus, despite the intent of the original rule to mitigate spending and over-preservation related to ESI, in practice, the limitations of the original rule actually encouraged cautious litigants to continue to incur unnecessary expenses to over-preserve ESI because those limitations encouraged inconsistent common law to develop.

Courts, litigants, and scholars came to agree that original Rule 37(e) did not effectively address the serious problems caused by the continued, exponential growth of ESI and the questions surrounding its production

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37. See Clare Kealey, *Discovering Flaws: An Analysis of the Amended Federal Rule of Civil Procedure 37(e) and Its Impact on the Spoliation of Electronically Stored Evidence*, 14 RUTGERS J.L. & PUB. POL'Y 140, 153 (2016).

38. Compare *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108–10 (2d Cir. 2002) (pre-Rule 37(e) case applying gross negligence standard to determine whether adverse inference was warranted for lost ESI and stating the “sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence”), with *Phillips Elecs. N. Am. Corp. v. BC Tech.*, 773 F. Supp. 2d 1149, 1197 (D. Utah 2011) (“Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.” (quoting *Turner v. Public Serv. Co.*, 563 F.3d 1136, 1149 (10th Cir. 2009))).

39. See, e.g., *Residential Funding Corp.*, 306 F.3d at 110.

40. See, e.g., *Phillips Elecs. N. Am. Corp.*, 773 F. Supp. 2d at 1201–03.

41. While the Committee lists ameliorating the excessive effort and money spent to preserve ESI because of the threat of sanctions as the primary policy underlying the amendment to the rule, not everyone agrees. See, e.g., Yablon, *supra* note 7, at 573 (“The purpose of new Rule 37(e), as actually enacted, remains obscure.”). Indeed, the risk of sanctions for spoliated ESI is just one of the many reasons a party may over-preserve ESI. For example, as one court explained, “Electronic data is difficult to destroy and storage capacity is increasing exponentially, leading to an unfortunate tendency to keep electronically stored information even when any need for it has long since disappeared.” *Covad Comms. Co. v. Revonet, Inc.*, 258 F.R.D. 5, 16 (D.D.C. 2009).

(or nonproduction) in litigation.<sup>42</sup> And a number of constituencies determined “more uniform standards and guidelines [were] needed to guide counsel through the complex tasks of discovery.”<sup>43</sup>

### C. 2015 AMENDMENT

At the same time that concerns about e-discovery were growing, serious concerns about the conduct of civil litigation more generally were mounting around the country. Spurred by “‘complaints about the costs, delays, and burdens’ of civil litigation in federal courts,” the Committee held the Civil Litigation Conference at Duke University (the Duke Conference) in 2010.<sup>44</sup> The Duke Conference, which generated forty papers and twenty-five data compilations, confirmed widespread agreement that, in many cases, civil litigation had become too expensive, exceedingly time-consuming, and overly contentious, which effectively inhibited access to the courts to resolve disputes.<sup>45</sup> In response, the Committee created a subcommittee to study and propose amendments to the Federal Rules of Civil Procedure.<sup>46</sup> Among the issues the Committee specifically sought to address were “serious new problems associated with vast amounts of [ESI].”<sup>47</sup>

In the years following the Duke Conference, the Committee spent considerable time and effort revising Rule 37(e) and the other rules identified as needing attention.<sup>48</sup> From the beginning, “[d]iscovery proposals were abundant.”<sup>49</sup> To gather further feedback and implement changes to the proposed rules, the Committee published proposed amendments, received numerous rounds of written comments, and held public hearings in

42. See, e.g., Thomas Y. Allman, *Inadvertent Spoliation of ESI After the 2006 Amendments, The Impact of Rule 37(e)*, 3 FED. CTS. L. REV. 26, 26 (2009) (To say “Rule 37(e) has been met with intellectual disdain since its enactment in 2006 is putting it mildly”).

43. See Willoughby, Jones & Antine, *supra* note 23, at 793 (citing AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 1, 14–17 (2009)); Thomas Y. Allman, *Amending the Federal Rules (Again): Finding the Best Path to an Effective Duty to Preserve*, ENGAGE, Sept. 2010, at 92, 94; Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 683 (2009)); see also FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment (recognizing original Rule 37(e) had “not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information”).

44. Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 18 (2016) (citing JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 1 (2010); Memorandum from Hon. David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure to Hon. Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Practice & Procedure 35 (May 8, 2013) [hereinafter Campbell Memorandum]; Kravitz Memorandum, *supra* note 21, at 1).

45. ROBERTS, *supra* note 8, at 4.

46. Steinman, *supra* note 44, at 18.

47. ROBERTS, *supra* note 8, at 5.

48. *Id.*

49. Kravitz Memorandum, *supra* note 21, at 12 (reporting on the Duke Conference).

Dallas, Phoenix, and Washington, D.C.<sup>50</sup> Through this process, the Committee completely rewrote original Rule 37(e).

In 2015, the Supreme Court approved the amended rules, including amended Rule 37(e), effective on December 1 of that year. In forwarding the amended rules to Congress, Chief Justice Roberts “heap[ed]” praise on the amendments, characterizing them as “a ‘big deal,’ a ‘significant change,’ and a ‘major stride toward a better federal court system.’”<sup>51</sup>

Amended Rule 37(e) provides the following:

37(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:
  - (A) presume that the lost information was unfavorable to the party;
  - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
  - (C) dismiss the action or enter a default judgment.<sup>52</sup>

#### D. OPERATION OF AMENDED RULE

In crafting the amended rule, the Committee declared its intent to bring consistency and coherence to the determination of what sanctions, if any, should be levied in cases involving claims that ESI was not lost after a duty to preserve it had arisen.<sup>53</sup> In keeping with this goal, the Committee drafted the amended rules to include guidelines that apply to a wide array of unintentional, accidental losses of ESI, as well as guidelines that apply to intentional spoliation of ESI.<sup>54</sup>

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50. ROBERTS, *supra* note 8, at 5.

51. Steinman, *supra* note 44, at 48 (citing ROBERTS, *supra* note 8, at 5–9). In enacting the amended rule, however, the Committee did not intend it to “affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.” FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.

52. FED. R. CIV. P. 37(e).

53. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment. Of course, the goal of uniformity is ambitious and, thus, illusive. Already in cases in which courts have applied the amended rule, their decisions have not resulted in the development of uniform standards. For example, on the critical issue of whether lost ESI has prejudiced a party as required by Rule 37(e)(1), district courts have disagreed as to which party bears the burden of proof and as to what type of information satisfies that burden. *See, e.g.*, Joyce, *supra* note 2, at 982.

54. FED. R. CIV. P. 37(e)(2) (delineating available sanctions if a finding is made that the party intended to deprive another of the ESI’s use in the litigation).

Thus, the Committee enacted sweeping changes in the amended rule intended to remedy the lack of uniformity among the circuit courts in deciding claims of intentionally lost ESI.<sup>55</sup> Significantly, it broadened the amended rule's coverage beyond mere accidental losses of ESI, it provided clearer guidance in the text of the rule regarding findings needed to order remedial actions or other more severe sanctions, and in this way, it limited the availability of remedial measures or sanctions to cases where such measures or sanctions are clearly warranted.

The amended rule was intended to replace the practice that had developed under the original rule in which courts relied on their inherent authority when parties alleged spoliation of ESI.<sup>56</sup> Thus, going forward, courts were to rely on amended Rule 37(e) for authority to authorize specific remedial actions, to determine whether sanctions were warranted, and to determine what type of remedial actions or sanctions, if any, might be appropriate under the circumstances in each particular case.<sup>57</sup>

Recognizing the complexity of attempting to craft a rule to encapsulate the common law that had developed around when a duty to preserve arises, the Committee ultimately chose not to adopt such an express rule.<sup>58</sup> Regarding the duty to preserve, the text of amended Rule 37(e) refers merely to ESI "that should have been preserved in the anticipation or conduct of litigation."<sup>59</sup> Nothing in the amended rule's language provides guidance regarding when the duty to preserve arises. This fact is unsurprising as some on the Committee questioned whether it even would be possible to draft a rule that would adequately define the cir-

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55. Joyce, *supra* note 2, at 980; *see also* Thomas Y. Allman, Applying Amended Rule 37(e), at 2 (Oct. 3, 2016) (unpublished manuscript) (on file with author) [hereinafter Allman, *Applying Amended Rule 37(e)*]; John E. Motylinski, Note, *E-Discovery Realpolitik: Why Rule 37(e) Must Embrace Sanctions*, 2015 U. ILL. L. REV. 1605, 1607 n.19 (citing COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 3 (2013)).

56. *See supra* note 12 and accompanying text.

57. *See supra* note 12 and accompanying text.

58. *See, e.g.*, Kravitz Memorandum, *supra* note 21, at 14 (reporting on the Duke Conference) ("The duty to preserve was seen as an extraordinarily complex question, often addressed by statute or administrative regulation and connected to statutes of limitations."). Perhaps illustrative of the challenges of drafting a rule regarding the duty to preserve, as was recognized by the Committee, is the fact that, despite its importance, no federal rule or federal statute sets forth the duty to preserve evidence. *See* McPeak, *supra* note 17, at 49–50 (discussing a variety of sources of law that provide the scope of and authority for the duty to preserve evidence in anticipation of litigation); A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2006 (2011). Indeed, no single, all-encompassing source exists. *See* McPeak, *supra* note 17, at 50; Spencer, *supra*, at 2006 (proposing the Federal Rules of Civil Procedure be amended to address the duty to preserve evidence). Instead, these duties are products of both federal and state common laws. *See* McPeak, *supra* note 17, at 50–51; Spencer, *supra*, at 2006 n.10. Naturally, therefore, conflicts exist, making it challenging for litigants to predict when the duty to preserve arises, much less what standard should apply to determine whether the duty is met or whether sanctionable spoliation has occurred. *See* McPeak, *supra* note 17, at 50.

59. FED. R. CIV. P. 37(e).

cumstances that might trigger a duty to preserve before a lawsuit were filed.<sup>60</sup> And some feared doing so could risk undermining the Committee's ability to promulgate a rule that would garner sufficient support to pass.<sup>61</sup> The Committee notes, therefore, make clear that the rule does not "attempt to create a new duty to preserve"; instead, the rule relies on the already existing common-law duty.<sup>62</sup>

The amended rule's coverage is, however, substantially broader than the original rule's coverage. The amended rule applies in all cases involving lost ESI where a court first finds a duty to preserve had arisen before the ESI was lost and the ESI is "lost," whether the loss was accidental, as a result of "a party['s] fail[ure] to take reasonable steps to preserve it," or as a result of a party's "intent to deprive another party of the information's use in the litigation."<sup>63</sup>

Original Rule 37(e)'s limited safe harbor applied only if ESI was lost as a result of the routine operation of a party's computer system<sup>64</sup> and did not apply in situations involving accidental loss that was not the result of the routine operation of a party's computer system.<sup>65</sup> The original rule also failed to cover the intentional spoliation of ESI.<sup>66</sup> These failures contributed to the development of inconsistent and unpredictable law.<sup>67</sup>

To remedy this problem, amended Rule 37(e)'s applicability is broad. The rule is not limited to accidental losses of ESI due to a computer's normal operations.<sup>68</sup> Instead, as long as the loss occurred after a duty to preserve the ESI in anticipation of litigation had arisen, all kinds of accidental losses are covered by the first part of the amended rule—subsection (e)(1).<sup>69</sup> Similarly, intentional acts resulting in lost or spoliated ESI after a duty to preserve had arisen are covered by the second part of the amended rule—subsection (e)(2).<sup>70</sup>

The first part of the rule—subsection (e)(1)—provides explicit guidance in both situations regarding when and what types of remedial measures may be ordered in situations involving accidental losses. In those

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60. Kravitz Memorandum, *supra* note 21, at 12.

61. *Id.*

62. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment. While the existence of this duty is not controversial, determining specifically a duty to preserve has arisen in a particular case and deciding the extent of that duty requires thoughtful analysis of the specific facts and circumstances of each case. *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 642 (S.D. Tex. 2010).

63. FED. R. CIV. P. 37(e).

64. *See, e.g., Rimkus*, 688 F. Supp. 2d at 642 (concluding original Rule 37(e), which precluded "sanctions if the loss of the information arises from the routine operation of the party's computer system, operated in good faith," did not apply where the information was lost as a result of an intentional act).

65. *See* FED. R. CIV. P. 37(e) advisory committee's note to 2006 amendment.

66. *See supra* note 64.

67. *See, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 110 (2d Cir. 2002).

68. FED. R. CIV. P. 37(e); *Cat3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 495 (S.D.N.Y. 2016); Allman, *Applying Amended Rule 37(e)*, *supra* note 55, at 1.

69. FED. R. CIV. P. 37(e)(1).

70. *Id.* 37(e)(2).

situations, before a court may order remedial measures, certain prerequisites must be met: (1) the ESI must be “lost,” meaning it “cannot be restored or replaced through additional discovery”; (2) the loss must be caused by a failure “to take reasonable steps to preserve it”; and (3) another party must be prejudiced by the loss of the ESI.<sup>71</sup>

The analysis of whether ESI is lost requires a court to determine the ESI cannot be restored or replaced through additional discovery.<sup>72</sup> According to the rule’s plain language, if the ESI can be restored or replaced, the ESI is not lost, and the inquiry under Rule 37(e) ends because the rule does not authorize remedial measures or sanctions to be ordered.<sup>73</sup>

In addition, because the first part of the rule calls only for reasonable steps to preserve, it does not authorize remedial measures or sanctions when a party takes reasonable steps to preserve but the information is lost despite those efforts.<sup>74</sup> In other words, the amended rule does not require perfection.<sup>75</sup> Unfortunately, no bright-line distinctions exist between what does or does not qualify as reasonable steps.<sup>76</sup> Indeed, what is reasonable depends largely on whether what was done—or not done—was proportional to the issues in the case.<sup>77</sup>

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71. *Id.* 37(e)(1).

72. *Id.* 37(e).

73. *Id.*; see also *Palmer v. Allen*, No. 14-CV-12247, 2016 WL 5402961, at \*2 (E.D. Mich. Sept. 28, 2016) (denying motion for sanctions where missing videos were later recovered); *Marquette Transp. Co. Gulf Island v. Chembulk Westport*, No. 13-6216, 2016 WL 930946, at \*3 (E.D. La. Mar. 11, 2016) (denying motion for sanctions after data was discovered and produced). When ESI cannot be restored or replaced, a court must determine whether the information is in fact “lost.” *Black’s Law Dictionary* defines “lost” as “beyond the possession and custody of its owner and not locatable by diligent search [i.e.] lost at sea [or] lost papers.” *Lost*, BLACK’S LAW DICTIONARY (11th ed. 2019). Merriam-Webster defines “lost” as “no longer possessed” and also adds specifically that “lost” includes things that are “ruined or destroyed.” *Lost*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/lost> [<https://perma.cc/763Y-2QC7>]. But courts have already analyzed this question in conflicting ways. Specifically, on the question of whether the meaning of “lost” encompasses information that is altered or destroyed, courts have disagreed. For example, one of the first courts to decide a spoliation motion under amended Rule 37(e) determined that altered ESI was “lost” because the existence of the altered version of the ESI undermined the authenticity of the unaltered version of the ESI as well. See, e.g., *Cat3*, 164 F. Supp. 3d at 494–95 (determining the existence of altered ESI resulted in the original ESI being “lost” because the alteration undermined the authenticity of both versions). On the other hand, more recently, a different court held altered ESI did not qualify as “lost,” in part, because the altered ESI was “destroyed” rather than lost. See, e.g., *Legacy Data Access, LLC v. MediQuant, Inc.*, No. 3:15-cv-00584-FDW-DSC, 2017 WL 6001637, at \*9 n.8 (W.D.N.C. Dec. 4, 2017). For a more detailed discussion of this case, see *infra* Part III.

74. *Cat3*, 164 F. Supp. 3d at 495–96.

75. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.

76. *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010).

77. *Id.* Thus, the analysis of what is reasonable depends heavily on the facts and circumstances of each case. *Cat3*, 164 F. Supp. 3d at 496. For example, courts should consider a party’s knowledge of certain outside risks of loss, such as a flooded computer room, a “cloud” service failure, or “a malign software attack,” and whether the party took steps to protect against losses due to those risks. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.

In addition to finding a failure to take reasonable steps to preserve, the first part of the amended rule—the part that applies to unintentional losses of ESI—requires a finding of prejudice to another party before remedial measures may be ordered and limits the available remedial measures to those “no greater than necessary to cure the prejudice.”<sup>78</sup> Thus, the range of available remedial measures is quite broad but not unlimited.<sup>79</sup> “There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case.”<sup>80</sup>

The second part of amended Rule 37(e)—subsection (e)(2)—specifically covers intentional actions that result in lost ESI and authorizes courts to order severe sanctions in those situations, but before doing so, the amended rule requires courts to make specific findings. The court must find the party against whom sanctions are sought intended to deprive another party of the ESI’s use in litigation.<sup>81</sup> Upon finding the requisite intent, however, prejudice is assumed.<sup>82</sup> Nevertheless, even when a court finds the requisite intent to deprive, the court is not required to order one of these most serious of sanctions because such an order may have the effect of ending a case altogether.<sup>83</sup> The available sanctions include “presum[ing] that the lost information was unfavorable to the party; . . . instruct[ing] the jury that it may or must presume the information was unfavorable to the party; or . . . dismiss[ing] the action or enter[ing] a default judgment.”<sup>84</sup> Thus, even when there is a finding of the requisite intent, courts should use caution in deploying the serious

78. *Hernandez v. Tulare Cty. Correction Ctr.*, No. 1:16-CV-00413-EPG, 2018 WL 784287, at \*4 (E.D. Cal. Feb. 8, 2018) (citing FED. R. CIV. P. 37(e)(1)).

79. *Id.* (citing FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment).

80. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.

81. FED. R. CIV. P. 37(e).

82. *Id.* 37(e)(2); HEDGES, ROTHSTEIN & WIGGINS, *supra* note 1, at 45. Neither the rule nor the Committee notes, however, define what qualifies as “intent to deprive.” *See, e.g.*, Casey C. Sullivan, *Proving Intent to Deprive Under Rule 37(e)(2)—Or, More Often, Not*, LOGIKCULL BLOG (Apr. 18, 2019), <http://www.logikcull.com/blog/proving-intent-to-deprive-under-rule-37e2-or-more-often-not> [<https://perma.cc/PX6G-9MEY>] (discussing various ways in which courts have analyzed whether intent to deprive for purposes of Rule 37(e) exists).

83. FED. R. CIV. P. 37(e)(2); *Hernandez*, 2018 WL 784287, at \*4 (citing FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment).

84. FED. R. CIV. P. 37(e)(2). An adverse inference instruction is one that either allows or requires a jury to infer the missing ESI would have been damaging to the party that lost it. *See, e.g.*, *Rimkus Consulting Grp., Inc. v. Cammarata*, 668 F. Supp. 2d 598, 608 (S.D. Tex. 2010); Scott M. O’Brien, Note, *Analog Solutions: E-Discovery Spoliation Sanctions and the Proposed Amendments to FRCP 37(e)*, 65 DUKE L.J. 151, 155 (2015). The Committee intended the amended rule “to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve ESI.” *Hernandez*, 2018 WL 784287, at \*3 (citing FED. R. CIV. P. 37 advisory committee’s note to 2015 amendment). Some experts have noted, however, that courts have already applied different standards of proof for the imposition of these types of sanctions under the amended rule. *See* HEDGES, ROTHSTEIN & WIGGINS, *supra* note 1, at 45 (comparing *Cat3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 499 (S.D.N.Y. 2016) (requiring clear and convincing proof), with *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 777 (7th Cir. 2016) (allowing preponderance of the evidence)).



sanctions listed in the second part of the rule.<sup>85</sup>

This backdrop provides context against which to analyze certain decisions that have refused to apply, misconstrued, or ignored the amended rule. To avoid misleading, however, and as additional context, it is helpful to note that, in large part, in lost ESI cases decided after December 1, 2015, courts have relied on and applied amended Rule 37(e) in ways consistent with its plain language and the Committee notes accompanying its enactment.<sup>86</sup>

### III. TROUBLING POST-AMENDMENT DEVELOPMENTS

Nevertheless, while most courts are properly relying on and citing the amended rule, a surprising number are not. Indeed, one commentator has identified over one hundred cases that should have applied amended Rule 37(e) but failed to.<sup>87</sup> A number of courts refused to apply the amended rule to cases already pending when the amendments went into effect. Other courts have misconstrued amended Rule 37(e), treating it more in line with the original rule's text than with the text of the amended rule. And still, other courts have ignored the rule altogether in favor of applying pre-amendment precedents involving spoliation of ESI. Thus, despite Chief Justice Roberts's optimism,<sup>88</sup> the rule's contribution to the 2015 amendments as "a 'big deal,' a 'significant change,' and a 'major stride toward a better federal court system'"<sup>89</sup> may be threatened if these developments continue.

#### A. FAILING TO APPLY THE RULE TO ALREADY PENDING CASES

Unremarkably, the 2015 amendments to the Federal Rules of Civil Procedure apply in all cases filed after December 1, 2015. The instructions accompanying the adoption of the 2015 amendments, however, also presume courts would apply the amended rules to already filed cases "insofar as [is] just and practicable."<sup>90</sup> That presumption covers most situations

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85. *Hernandez*, 2018 WL 784287, at \*4 (citing FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment). Courts should ensure the remedy fits the wrong, and the serious sanctions should not be used if lesser measures, such as those specified in section (e)(1), would be sufficient to remedy the wrong. *Id.*

86. Allman, Applying Amended Rule 37(e), *supra* note 55, at 21 (assessing the effectiveness of the amended rule thus far and concluding, "Amended Rule 37(e) has successfully resolved the circuit split on the minimum culpability required for use of harsh spoliation measures. Contrary to the predictions of some, this has not unfairly 'insulated' spoliation which merits severe sanctions.").

87. See *supra* note 14 and accompanying text.

88. Steinman, *supra* note 44, at 48 (citing ROBERTS, *supra* note 8, at 2–9).

89. *Id.* In enacting the amended rule, however, the Committee did not intend it to "affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim." FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

90. *Cat3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 495–96 (S.D.N.Y. 2016) (recognizing that Chief Justice Roberts's order transmitting the proposed rules to Congress with the instruction that the rules governed in proceedings already pending "insofar as just and practicable" was consistent with the relevant statutory provision, 28 U.S.C. § 2074(a)).

because the amended rule leaves unchanged the already existing duty to preserve ESI in anticipation of litigation, provides guidance on a broader array of cases involving lost ESI, and requires certain findings be made before courts may order remedial measures or more severe sanctions. Thus, the rule is more lenient than the regime it replaced.<sup>91</sup> Nevertheless, a number of courts have refused to apply the amended rule to cases pending when the amended rule was passed.

Significantly, the amended rule does not require parties to do anything they had not already been required to do.<sup>92</sup> As outlined above, amended Rule 37(e) did not change the existing duty to preserve evidence.<sup>93</sup> Under well-settled common law, a duty to preserve evidence arises when a party knows or should have known the evidence is relevant to or may be relevant to future litigation.<sup>94</sup>

In addition, amended Rule 37(e) provides clarity in a wider array of cases insofar as it is not limited to accidental losses of ESI related to the routine operation of a computer. Unlike original Rule 37(e) and the law that developed around the original rule as a consequence of its narrow reach, amended Rule 37(e) provides guidance and limitations on the availability of remedial measures and sanctions in all types of ESI cases, as long as the ESI was lost after a duty to preserve it in anticipation of litigation had arisen before the loss.

In cases involving accidental losses, the amended rule requires findings that ESI is lost, that the loss was caused by a failure “to take reasonable steps to preserve,” and that another party would be prejudiced by the loss of the ESI, unless remedial measures are ordered.<sup>95</sup> In cases involving allegations of intentional spoliation, the amended rule requires a “finding that the party acted with the intent to deprive another party of the information’s use in the litigation” before severe sanctions, such as adverse inference instructions, may be ordered.<sup>96</sup> The amended rule’s clearer guidance and restrictions on the use of remedial measures and other more severe sanctions makes the amended rule somewhat more lenient on parties against whom sanctions or other remedial measures are sought.

It is, therefore, difficult to see how applying amended Rule 37(e) to disputes regarding lost ESI that were already pending would not be just and practicable to the party against whom sanctions were sought.<sup>97</sup> So,

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91. See Allman, Applying Amended Rule 37(e), *supra* note 55, at 25.

92. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment. The duty to preserve evidence in anticipation of litigation and to avoid spoliation, after all, have been bedrock principles of litigation practice in this country. Brookreson, *supra* note 26, at 180 (citing Robert D. Owen & Thomas Y. Allman, *The Common Law Duty to Preserve ESI and the Impact of Rule 37(e)*, in *THE FEDERAL JUDGES’ GUIDE TO DISCOVERY* 43, 48 (Robert D. Owen ed., 2015)).

93. See discussion *supra* Part II.D.

94. *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 612 (S.D. Tex. 2010).

95. FED. R. CIV. P. 37(e)(1).

96. *Id.* 37(e)(2).

97. See Allman, Applying Amended Rule 37(e), *supra* note 55, at 2–3.

the failure to apply the amended rule is troubling. Nevertheless, by their nature, cases filed by a particular date that has already passed cannot grow in number. Thus, the following discussion focuses on cases that were not filed until after December 1, 2015—the amendment’s effective date—as those cases, if followed, could jeopardize the effectiveness of the amended rule.

## B. MISAPPLYING THE RULE IN LATER-FILED CASES

Among all the cases filed after December 1, 2015, two categories of cases that misapply the rule are identified here. In the first, courts have construed amended Rule 37(e) so narrowly that the application of the amended rule appears indistinguishable from the application of the original rule. In other words, although the courts cite amended Rule 37(e), they misconstrue it and ignore significant changes brought by the 2015 amendment. In the second, some courts have failed to cite amended Rule 37(e) at all in their analysis of lost ESI, instead relying on precedents that were abrogated by the rule’s amendment.

### 1. *Misconstruing Amended Rule 37(e) in Later-Filed Cases*

Some courts have improperly held that Rule 37(e) does not apply to intentionally spoliated ESI, as opposed to unintentionally lost ESI. Recall that one of the major problems with original Rule 37(e)—and one of the reasons it was often ignored in favor of reliance on courts’ inherent authority to manage litigation—was that original Rule 37(e) applied only to a narrow category of accidental losses of ESI and did not apply to intentional spoliation. Amended Rule 37(e), however, applies broadly to all cases involving lost or spoliated ESI, as long as the loss occurred after a duty to preserve the ESI in anticipation of litigation had arisen.

Nevertheless, at least one court has refused to apply amended Rule 37(e) to a case involving allegations of intentional spoliation, as opposed to accidental loss. In *Legacy Data Access, LLC v. MediQuant, Inc.*, the court refused to apply amended Rule 37(e). Specifically, the court held the case did not involve a “loss” of ESI because the ESI at issue was destroyed rather than “lost.”<sup>98</sup> At trial, the court allowed a spoliation instruction to be given to the jury regarding unavailable ESI that was relevant to the case.<sup>99</sup> At the end of the trial, the jury found the defendant was liable to the plaintiff and awarded punitive damages against the defendant.<sup>100</sup>

After trial, the defendant argued, among other things, the court erred by allowing the spoliation instruction.<sup>101</sup> Specifically, the defendant argued that under amended Rule 37(e), the plaintiff had to show defendant

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98. *Legacy Data Access, LLC v. MediQuant, Inc.*, No. 3:15-cv-00584-FDW-DSC, 2017 WL 6001637, at \*9 n.8 (W.D.N.C. Dec. 4, 2017).

99. *Id.* at \*9.

100. *Id.* at \*1.

101. *Id.* at \*9.

“acted with intent to deprive” the plaintiff of ESI, but the plaintiff had failed to do so.<sup>102</sup> The court, however, rejected the defendant’s Rule 37(e) argument. The court reasoned because the case involved an alteration or “the destruction of ESI, not the loss of ESI,” amended Rule 37(e)(2) did not apply.<sup>103</sup>

In its holding, the court relied in part on the following language in the amended rule: “If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it . . . .”<sup>104</sup> The court read that quoted language alongside portions of the notes of the Committee to the 2015 amendment. It reasoned the rule’s language and the Committee’s notes meant “this provision ‘applies only when [ESI] is lost’ ‘because the party failed to take reasonable steps to preserve the information.’”<sup>105</sup> In other words, the court in *Legacy Data Access* concluded the amended rule, much like the narrow original rule it replaced, did not apply to cases involving allegations of intentionally spoliated ESI.

While it is true that the language in the first part of Rule 37(e) and the part of the Committee’s note on which the court relied can together be read to justify the court’s conclusion, the conclusion is flawed for several reasons. First, it renders significant portions of amended Rule 37(e) superfluous. Second, it takes the Committee’s notes out of context and ignores several notes that weigh against the court’s interpretation. Finally, the conclusion is at odds with the Committee’s stated goals in amending Rule 37(e). Simply put, such a conclusion misreads the rule and ignores its underlying purpose.

Despite being consistent with original Rule 37(e), the court’s conclusion fails to give meaning to the plain language of amended Rule 37(e). The language of original Rule 37(e) referred only to ESI “lost as a result of the routine, good-faith operation of an electronic information system.”<sup>106</sup> Similarly, the first part of amended Rule 37(e) covers inadvertent losses, but it does not limit such losses to those occurring as a result of a computer system’s routine, good faith operation. Instead, this part of the amended rule more broadly refers to “electronically stored information that should have been preserved in the anticipation or conduct of litigation [that] is lost because a party failed to take reasonable steps to preserve it.”<sup>107</sup> This language in the amended rule was quoted but misconstrued by the court in *Legacy Data Access*.

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102. *Id.* at \*9 n.8.

103. *Id.*

104. FED. R. CIV. P. 37(e).

105. *Legacy Data Access*, 2017 WL 6001637, at \*9 n.8.

106. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment. In its entirety, original Rule 37(e) provided, “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as the result of the routine, good-faith operation of an electronic information system.” *Id.* The original rule made no mention of what happens when a party acts with the intent to deprive another of the ESI’s use in litigation.

107. FED. R. CIV. P. 37(e).

The court interpreted that language to mean amended Rule 37(e) does not apply if the party who lost the ESI did not take reasonable steps to preserve it. This interpretation emphasizes the “because” in the phrase, “If electronically stored information . . . is lost because a party failed to take reasonable steps to preserve it . . . .”<sup>108</sup> Thus, the argument is that if the ESI is lost because of intentional acts meant to alter or destroy the ESI, that information cannot have been lost despite a party’s reasonable efforts to preserve it. According to that logic, Rule 37(e) would not apply.

But while the first part of amended Rule 37(e) covers unintended losses by setting forth prerequisites and limiting the measures courts may order in the absence of a finding of an intent to deprive the other party of ESI, the second part of the amended rule covers intentional spoliation. That part specifically authorizes the imposition of severe sanctions in cases where there exists a finding of an intent to deprive the other party of the ESI’s use. The *Legacy Data Access* court’s interpretation, however, ignores the second part of amended Rule 37(e), which specifically authorizes the imposition of severe sanctions upon a finding that a “party acted with the intent to deprive another party of the information’s use in the litigation.”<sup>109</sup>

Reading the amended rule—like the court in *Legacy Data Access* did—as not applying in any situation in which a party acts intentionally because a party that intends to destroy or alter ESI cannot have taken reasonable steps to preserve ESI has some logical appeal. That reading, however, would render the amended rule almost as narrow as the original rule and would render the second part of amended Rule 37(e) utterly meaningless. If the existence of an intent to deprive another of the ESI meant amended Rule 37(e) did not apply to a case, there would be no need for nor logic supporting the second part of the rule that sets forth potential sanctions that may be ordered only after the court has found the existence of an intent to deprive another of the ESI’s use in litigation. Indeed, considering the whole of the amended rule, it is difficult to see how one could read the second part of the amended rule—starting with “only upon finding the party acted with the intent to deprive another party of the information’s use in litigation” and then listing the available sanctions in such cases<sup>110</sup>—to not cover scenarios involving intentional spoliation.<sup>111</sup> This language in amended Rule 37(e) makes clear that the rule is no longer limited to accidental or unintentional loss. Thus, while the court’s conclusion in *Legacy Data Access* would have been consistent with the law that developed around original Rule 37(e), it cannot be read in harmony with the amended rule.

The *Legacy Data Access* court’s conclusion is also flawed in that it ignores one of the primary underlying purposes for amending original Rule

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108. *Id.*

109. *See id.*

110. *Id.* 37(e)(2)(A)–(C).

111. *Id.*

37(e). The Committee intended the amended rule to resolve the conflict between circuits in which some required a finding of intent before severe sanctions could be ordered and others allowed such sanctions in cases involving gross negligence. Specifically, the Committee intended the amended rule to overrule cases, like *Residential Funding Corp. v. DeGeorge Financial Corp.*,<sup>112</sup> that had allowed an adverse inference instruction order on a finding of gross negligence.<sup>113</sup> The Committee stated that because adverse inference instructions are based on the premise that a party's intentional loss or destruction of evidence prevented its use in litigation, that premise supports a reasonable inference that the evidence was unfavorable to the party responsible for the loss or destruction of evidence.<sup>114</sup> Warning that adverse inference instructions, however, "may tip the balance at trial in ways the lost information never would have," the Committee determined they should be allowed only in situations in which intentional conduct existed.<sup>115</sup> In contrast, the Committee explained, "Negligent conduct or even grossly negligent behavior does not logically support [adverse inferences]."<sup>116</sup>

Thus, the Committee decided it was preferable to preserve a broad range of measures to cure prejudice caused by lost ESI through negligent or grossly negligent actions "but to limit the most severe measures to instances of *intentional loss or destruction*."<sup>117</sup> The text of amended Rule 37(e) does just that. Conduct that results in inadvertent loss of ESI is addressed in the first part of amended Rule 37(e), and conduct that results in the intentional loss or destruction of ESI is addressed in the second part of amended Rule 37(e).

In addition, while it quoted one of the Committee's many notes accompanying the amended rule, the court in *Legacy Data Access* ignored several additional Committee notes that conflict with the court's reasoning and holding. For example, in writing about the second part of the amended rule, the Committee stated, "[The rule] authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation."<sup>118</sup> The note continues, "[The rule] is designed to provide a uniform standard in federal court for the use of these serious measures when addressing failure to preserve electronically stored information."<sup>119</sup>

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112. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002).

113. *Hernandez v. Tulare Cty. Correction Ctr.*, No. 1:16-CV-00413-EPG, 2018 WL 784287, at \*4 (E.D. Cal. Feb. 8, 2018) (citing FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment).

114. *Id.*

115. *Id.*

116. *Id.*

117. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment (emphasis added).

118. *Id.*

119. *Id.*

The Committee also refers to intentional destruction of ESI when it explains why the second part of the amended rule does not require a separate finding of prejudice. There, the Committee notes, “[T]he finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that *intentionally destroyed* it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position.”<sup>120</sup> These comments further support the conclusion that reading amended Rule 37(e) as not applying to situations involving spoliation or intentional destruction or alteration of ESI gravely misinterprets the rule.<sup>121</sup>

## 2. Ignoring Amended Rule 37(e) in Later-Filed Cases

While the court in *Legacy Data Access* erroneously interpreted the rule in an overly narrow manner, other courts have apparently failed to even recognize that the information being sought was ESI. Still, other courts have recognized that the information sought was ESI but, nevertheless, applied law abrogated by amended Rule 37(e). Because these cases were decided after the 2015 amendments to the Federal Rules of Civil Procedure went into effect, litigants and courts may have reasonably concluded that if the rule’s amendments had affected the analysis, the cited cases would have made that fact clear.<sup>122</sup> As illustrated below, that conclusion was false in many cases.

### a. Failing to Identify ESI

A number of cases involving ESI failed to categorize it as such, which may have caused the failure to cite the amended rule. For example, the courts in *Barrett v. FedEx Custom Critical, Inc.*<sup>123</sup> and *Brown v. Sams’s*

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120. *Id.* (emphasis added).

121. Finally, the court’s decision in *Legacy Data Access* is also inconsistent with at least one post-amendment case in the Ninth Circuit that recognizes that amended Rule 37(e) applies in situations involving intentional destruction of ESI. *Roadrunner Transp. Servs., Inc. v. Tarwater*, 642 F. App’x. 759, 760 n.1 (9th Cir. 2016). That case was already pending when amended Rule 37(e) became effective; thus, the court did not rely on the amended rule to support its holding. The conclusion that amended Rule 37(e) applies to intentionally altered or destroyed ESI is also consistent with one of the earliest cases to interpret the amended rule, *Cat3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 500 (S.D.N.Y. 2016). In *Cat3*, the United States District Court for the Southern District of New York analyzed amended Rule 37(e) in a case involving allegations that the plaintiffs had fabricated email addresses to make it appear defendants had earlier notice that the plaintiffs had been using the trademark at issue in that case. *Id.* The court reasoned the existence of altered emails alongside the existence of unaltered emails brought the authenticity of both into question. *Id.* at 497. Thus, it concluded the ESI was “lost” as required by amended Rule 37(e). *Id.* at 500.

122. Before analyzing these cases, it is helpful to acknowledge that analyzing why these cases ignored the rule inevitably requires reasoned speculation. The fact that a court failed to cite a rule makes it impossible to say with certainty why the court failed to cite the rule. Unlike when a court considers a rule and determines it does not apply, when a court fails to even mention a rule, the court is unlikely to indicate why it chose not to cite the rule it did not cite.

123. *Barrett v. FedEx Custom Critical, Inc.*, No. 3:17-CV-62 (CDL), 2018 WL 1722385, at \*1 (M.D. Ga. Apr. 4, 2018) (evidence on computer systems).

*West Inc.*<sup>124</sup> fail to acknowledge the lost evidence being sought was ESI. These cases fail to mention the words “electronically stored information” or “ESI,” despite the evidence in each case qualifying as ESI. The evidence at issue in *Barrett* involved information stored on computer systems,<sup>125</sup> and the evidence in *Brown* related to surveillance video footage.<sup>126</sup> The courts in *Barrett* and *Brown* reside in different jurisdictions and those jurisdictions are on opposite sides of the pre-Rule 37(e) amendment circuit split regarding the level of culpability required for an adverse inference instruction. Thus, while the outcome in *Barrett* would likely have been the same had the court applied the amended rule, the outcome in *Brown* would likely have been different had the court applied amended Rule 37(e).

In *Barrett*, the court denied a request for spoliation sanctions because, while the lost evidence was relevant to the plaintiff’s claims, it was not the only evidence available to prove them. In addition, the court held the plaintiff had not shown the defendant’s failure to preserve the evidence would have resulted in prejudice to the plaintiff, and the court denied the plaintiff’s request for spoliation sanctions.<sup>127</sup>

In *Barrett*, a truck leased by FedEx and operated by one of its drivers hit the plaintiff on December 16, 2015—after the amended rule took effect. As a result, the plaintiff sued FedEx and other defendants, and the plaintiff’s lawyer sent a letter to FedEx, informing it of the plaintiff’s potential legal claims.<sup>128</sup> This letter should have triggered a litigation hold that would have prevented any potentially relevant ESI from being deleted or destroyed.

But it did not. FedEx failed to preserve the ESI kept on one of the two computer systems it used to keep track of its trucks and drivers. The two systems were Pro Detail and Omnitrac.<sup>129</sup> The Pro Detail data tracked the GPS locations of each of the FedEx trucks. The Omnitrac data kept track of the time drivers spent driving, on duty but not driving, off duty, or in their sleepers.<sup>130</sup> While the relevant Pro Detail data was preserved, the Omnitrac data was automatically purged after 180 days because FedEx failed to instruct Omnitrac to save the data.<sup>131</sup>

The lost Omnitrac data fit squarely within the first part of amended Rule 37(e): it was kept electronically; it “should have been preserved in the anticipation of . . . litigation”; it was “lost because a party failed to take reasonable steps to preserve it[;]” and it could not be restored or re-

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124. *Brown v. Sam’s West Inc.*, No. 2:15-cv-01964-LDG-CWH, 2018 WL 576826 (D. Nev. Jan. 26, 2018) (evidence on surveillance video).

125. *Barrett*, 2018 WL 1722385, at \*1.

126. *Brown*, 2018 WL 576826, at \*1.

127. *Barrett*, 2018 WL 1722385, at \*2.

128. *Id.* at \*1.

129. *Id.*

130. *Id.*

131. *Id.*



placed through additional discovery.”<sup>132</sup> The data was kept in a computer system. At the very least, when it received the December 28, 2015 letter from the plaintiff’s lawyer, FedEx had a duty to preserve the ESI because it should have reasonably anticipated litigation. The ESI was lost because FedEx’s risk management and legal departments failed to notify Omnitracs that the information should not be purged during the regularly scheduled automatic purge. And the Omnitracs data could not be re-stored or replaced through additional discovery as it no longer existed.

On learning of the ESI’s deletion, the plaintiff sought spoliation sanctions, relying on Eleventh Circuit law that predated the amendment to Rule 37(e).<sup>133</sup> The plaintiff argued the court should either strike FedEx’s answer or prohibit FedEx from presenting evidence to contest the plaintiff’s evidence on liability or punitive damages.<sup>134</sup> The plaintiff argued that the lost Omnitracs data was central to his claim that the FedEx driver’s fatigue caused the accident and FedEx knew or should have known the driver was unsafe.<sup>135</sup>

Because the Omnitracs data was not the only evidence of the FedEx driver’s duty-status/work-load in the days before the accident, however, the court held the plaintiff had not shown FedEx’s failure to preserve the Omnitracs data would result in prejudice, and the court refused to order spoliation sanctions.<sup>136</sup> Under the amended rule, the availability of other evidence could result in a finding that the ESI was not lost. And under the amended rule, no remedial action or more serious sanctions would be authorized given the failure to show prejudice to the plaintiff and the lack of any evidence of an intent to deprive on FedEx’s part.

Much of the decision and analysis in *Barrett* are consistent with amended Rule 37(e) and its underlying purposes. The court in *Barrett* correctly recognized “the most severe sanctions ‘are reserved for “exceptional cases,” generally only those in which the party lost or destroyed material evidence intentionally in bad faith and thereby prejudiced the opposing party in an incurable way.’”<sup>137</sup> In determining whether the plaintiff’s requested sanction was warranted, the court considered whether the plaintiff was prejudiced as a result of the destruction of the ESI, whether the prejudice could be cured, whether the evidence had practical importance in the case, and whether the defendant acted in good or bad faith.<sup>138</sup> Although the plaintiff argued that the lost ESI was central to his claim that the defendant’s driver’s fatigue caused the accident and the defendant knew or should have known the driver was un-

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132. See FED. R. CIV. P. 37(e); *Barrett*, 2018 WL 1722385, at \*1; see also discussion *supra* Part II.D.

133. See *Barrett*, 2018 WL 1722385, at \*1 (citing *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005)).

134. *Id.*

135. *Id.* at \*2.

136. *Id.*

137. *Id.* at \*1 (citing *Cooper Tire & Rubber Co. v. Koch*, 812 S.E.2d 256, 263 (Ga. Mar. 15, 2018) (quoting *Phillips v. Harmon*, 774 S.E.2d 596, 606 (Ga. 2015))).

138. Compare *id.* at \*2, with FED. R. CIV. P. 37(e).

safe, the court determined that this evidence was available elsewhere and thus denied the requested sanctions.<sup>139</sup>

Similar to the *Barrett* case, in the *Brown* case, the plaintiffs sought sanctions for lost ESI, and again, the decision failed to identify that the evidence sought was ESI or apply amended Rule 37(e).<sup>140</sup> But, unlike the court in *Barrett*, after relying on its inherent authority, the court in *Brown* ordered the severe sanction of an adverse jury instruction upon finding the defendant's failure to preserve the evidence was the result of the defendant's "negligent or reckless action."<sup>141</sup> The *Brown* case involved a slip-and-fall incident at a Sam's Club store. After filing suit, the plaintiffs requested discovery, including footage from a surveillance camera near where the slip-and-fall occurred, but the defendants failed to preserve it.<sup>142</sup> As a result, the plaintiffs requested the court strike the defendant's answer or, in the alternative, give an adverse instruction to the jury that, had the video footage been preserved, it would have been favorable to the plaintiffs.<sup>143</sup>

Relying on Ninth Circuit precedent that predated the amended rule's effective date, the court denied the plaintiffs' request for terminating sanctions but granted the plaintiffs' request for an adverse inference instruction.<sup>144</sup> Analyzing the requisite culpability to support an adverse jury instruction, the court in *Brown* wrote the following:

A finding of bad faith is not a prerequisite for an adverse inference. . . . The court need only find that the nonmoving party acted with "conscious disregard" of its obligations. Although the Ninth Circuit has approved the use of adverse inferences as sanctions for spoliation of evidence, it has not articulated a precise standard for determining when spoliation sanctions are appropriate. "Trial courts have widely adopted the Second Circuit's three-part test, which provides that a party seeking an adverse inference instruction based on the destruction of evidence must establish: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the evidence was destroyed with a culpable state of mind; and (3) that the evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense."<sup>145</sup>

The court further noted that a "party's destruction of evidence qualifies as willful spoliation if the party has some notice that the documents were

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139. *Barrett*, 2018 WL 1722385, at \*2.

140. *Brown v. Sam's West Inc.*, No. 2:15-cv-01964-LDG-CWH, 2018 WL 576826, at \*1 (D. Nev. Jan. 26, 2018).

141. *Id.* at \*4.

142. *Id.* at \*1.

143. *Id.*

144. *Id.* at \*5.

145. *Id.* at \*2 (internal citations omitted) (citing *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 988 (N.D. Cal. 2012)).

potentially relevant to the litigation before they were destroyed.”<sup>146</sup>

Although the court in *Brown* did not cite the *Residential Funding* case<sup>147</sup>—the case specifically identified in the Committee notes as one amended Rule 37(e) intended to overrule—the language quoted in *Brown* and excerpted above is the requisite culpability standard for an adverse jury instruction set forth by the Second Circuit in *Residential Funding*.<sup>148</sup> Of course, that standard was abrogated by the enactment of amended Rule 37(e).<sup>149</sup>

To properly analyze the defendant’s culpability in *Brown*, the court should have applied amended Rule 37(e) and examined whether the defendant intended to deprive the plaintiffs of the ESI’s use in litigation. Instead, however, the court analyzed old law and determined the requisite culpability was met because “Sam’s West consciously disregarded its obligation to preserve the relevant video”; the defendant knew about the accident and its store policy required preserving the video; and the only explanation Sam’s West provided for the failure to preserve was an employee’s testimony that “she did not see any camera shots that had anything to do for the incident.”<sup>150</sup> Considering this evidence, the court concluded the plaintiffs carried their “burden of demonstrating that Sam’s West failed to preserve [ESI] with a culpable state of mind,” which supported an adverse inference instruction.<sup>151</sup>

#### b. Identifying ESI but Ignoring the Rule

Unlike the courts in the *Barrett* and *Brown* cases, several federal courts have identified the evidence being sought as ESI. But these courts, like those in *Barrett* and *Brown*, nevertheless, failed to recognize or cite Rule 37(e) in their analysis of ESI sanctions. Examples include the court in the *A.T.O. Golden Construction Corp. v. Allied World Insurance Co.* case,<sup>152</sup> the court in the *Kische USA LLC v. Simsek* case,<sup>153</sup> and the court in the *Galicía v. National Railroad Passenger Corp.* case.<sup>154</sup> Each of these courts incorrectly declared only two sources of authority existed under which a federal court could sanction a party who had engaged in the spoliation of evidence: (1) the inherent authority of federal courts to impose sanctions when parties engage in abusive litigation practices; and (2) the availability under Federal Rule of Civil Procedure 37(b) to impose sanctions against

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146. *Id.* (quoting *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006)).

147. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).

148. *Id.*

149. FED. R. CIV. P. 37(e).

150. *Brown*, 2018 WL 576286, at \*4.

151. *Id.*

152. *A.T.O. Golden Constr. Corp. v. Allied World Ins. Co.*, No. 17-24223, 2018 WL 5886663, at \*3–5 (S.D. Fla. Nov. 9, 2018).

153. *Kische USA LLC v. Simsek*, No. C16-0168JLR, 2018 WL 620493, at \*1 (W.D. Wash. Jan. 29, 2018).

154. *Galicía v. Nat’l R.R. Passenger Corp.*, No. CV 17-8020-JFW (JCx), 2018 WL 6314191, at \*1 (C.D. Cal. July 20, 2018).

a party “who ‘fails to obey an order to provide or permit discovery.’”<sup>155</sup>

These declarations improperly suggest that, even in light of Rule 37(e)’s amendment, when a party’s conduct does not violate a discovery order, a district court has no other recourse but to rely on its inherent authority to issue sanctions when they are warranted.<sup>156</sup> Of course, that suggestion is not true. Amended Rule 37(e) provides an additional authority under which federal courts may order sanctions, while at the same time limiting the circumstances under which courts may rely on their inherent authority to order sanctions for lost or spoliated ESI.<sup>157</sup> The view that courts may rely on their inherent authority to sanction misconduct that is covered by amended Rule 37(e) is inconsistent both with the rule’s plain language and the Committee notes that accompany the amended rule.<sup>158</sup>

In addition, like the courts in *Barrett* and *Brown*, each of the courts in the cases examined below applied the culpability standard for sanctions that existed in their jurisdictions before amended Rule 37(e) changed the culpability requirement for sanctions. Like the conflicting pre-amendment law on the culpability required for an adverse inference instruction in *Barrett* and *Brown*, the law regarding the requisite culpability in these cases reflects the split in authority the amended rule was intended to resolve. Thus, as illustrated below, the failure to cite amended Rule 37(e) and apply its prerequisites for the serious sanction of an adverse jury instruction resulted in conflicting outcomes. These cases, like the cases discussed above, threaten to perpetuate the very split in legal authority that amended Rule 37(e) sought to eliminate.

In *A.T.O. Golden Construction*,<sup>159</sup> although the court failed to apply Rule 37(e), that failure probably did not result in an outcome that would have been different had the amended rule been applied. The court in *A.T.O. Golden Construction* resides in the Eleventh Circuit and thus applied pre-existing Eleventh Circuit law that was more consistent with the amended Rule 37(e) because, even before the rule amendment, the Eleventh Circuit required a showing of an intent to spoliage before an adverse jury instruction would be ordered. Thus, in *A.T.O. Golden Construction*, when the defendants filed a motion in limine seeking, among other things, an adverse inference instruction based on the plaintiff’s alleged spoliation of ESI without proving the plaintiff acted in bad faith, the court rejected the request.<sup>160</sup> The discovery dispute arose when the defendants deposed plaintiff’s Rule 30(b)(6) witness and learned that data

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155. See, e.g., *id.* at \*2 (citing *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (quoting FED. R. CIV. P. 37(b)(2)(A)).

156. See, e.g., *id.*

157. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.

158. There is no universal agreement on the effect of the Committee’s note on this point. See, e.g., Francis & Mandel, *supra* note 34, at 615.

159. *A.T.O. Golden Constr. Corp. v. Allied World Ins. Co.*, No. 17-24223-Civ, 2018 WL 5886663, at \*3–5 (S.D. Fla. Nov. 9, 2018).

160. *Id.* at \*3.

on three laptops was lost when they crashed.<sup>161</sup> The defendants then alleged the plaintiff disposed of the laptops to keep the defendants from examining them or conducting their own recovery efforts.<sup>162</sup>

In rejecting the defendants' request for an adverse inference instruction, the court reasoned that the request relied on speculation without any evidence that relevant evidence had been destroyed.<sup>163</sup> The court reasoned that, if speculation were sufficient for a spoliation finding, "spoliation motions would be filed in every case that a discovery dispute arises."<sup>164</sup> While the court decided the sanctions motion without mentioning—much less applying—amended Rule 37(e), it is unlikely the outcome in the case would have been different had it applied the amended rule, which would have required the court to find the plaintiff acted with the intent to deprive the defendants of the ESI's use in litigation.

In contrast, in the *Kische* and *Galicia* cases, the outcomes would likely have been different if the court had applied amended Rule 37(e). The courts in both of those cases reside in the Ninth Circuit. "In the Ninth Circuit, spoliation of evidence raises a presumption that the destroyed evidence goes to the merits of the case, and further, that such evidence was adverse to the party that destroyed it."<sup>165</sup> In addition, prior to the amendment of Rule 37(e), the Ninth Circuit applied the three-part test set forth by the Second Circuit in the now abrogated *Residential Funding* case to requests for adverse jury instruction.<sup>166</sup> The level of culpability found to support an adverse inference instruction in the *Kische* and *Galicia* cases conflicts with the level of culpability required by amended Rule 37(e). Thus, the courts in both *Kische* and *Galicia*, among other things, ordered adverse inference instructions be given at trial—instructions that would not have been allowed had the amended rule been applied as required.<sup>167</sup>

Under amended Rule 37(e)(2), before an adverse inference instruction may be ordered, the court must determine that the nonproducing party intended to deprive the other party of the ESI's use in the litigation.<sup>168</sup> It is not enough that there is a finding that a party knew ESI might be relevant when it spoliated it. To order an adverse inference instruction, the court must first find that the party intended to deprive another of the ESI's use in litigation when it spoliated the ESI.

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161. *Id.*

162. *Id.*

163. *Id.* at \*5.

164. *Id.*

165. *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 993 (N.D. Cal. 2012).

166. *See, e.g., Brown v. Sam's West Inc.*, No. 2:15-cv-01964-LDG-CWH, 2018 WL 576826, at \*2 (D. Nev. Jan. 26, 2018) (citing *Apple Inc.*, 888 F. Supp. 2d at 989–90); *see also* *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006).

167. *See, e.g., Kische USA LLC v. Simsek*, No. C16-0168JLR, 2018 WL 620493, at \*8 (W.D. Wash. Jan. 29, 2018); *Galicia v. Nat'l R.R. Passenger Corp.*, No. CV 17-8020-JFW (JCx), 2018 WL 6314191, at \*2 (C.D. Cal. July, 20, 2018).

168. FED. R. CIV. P. 37(e)(2).

## IV. ANALYSIS AND RECOMMENDATIONS

Decisions that fail to recognize amended Rule 37(e)'s broad application, fail to recognize ESI for what it is, or fail to apply Rule 37(e)'s guidelines—relying instead on pre-amendment law governing sanctions—threaten to undermine Rule 37(e)'s effectiveness. Amended Rule 37(e) was intended to decrease costs associated with discovery of ESI by lessening expenses incurred to over-preserve ESI.<sup>169</sup> But if courts rely on the problematic cases analyzed in this article and others like them, more uncertainty will develop around the amended rule, just as it did around the original Rule 37(e). Following these cases would perpetuate conflicts in the law that amended Rule 37(e) was meant to resolve. This section, therefore, considers actions that may stop the spread of these flawed decisions and avoid exacerbating an already confusing area of law.<sup>170</sup>

Among the actions are educating lawyers and judges about the existence of the now-not-so-new amended rule, recognizing the relationship between the Federal Rules of Civil Procedure and the authorities on which the problematic cases rely, reinforcing lawyers' ethical obligations to research and analyze law competently, and encouraging parties to cooperate early and often when dealing with discovery of ESI to avoid spawning wasteful satellite litigation that can and should be avoided.

When it proposed the 2015 amendments to the Federal Rules of Civil Procedure, the Committee recognized that the rules might not immediately be followed and that it would take time for judges and the practicing bar to understand the new rules.<sup>171</sup> In a memo to the Chair of the Committee on Rules of Practice and Procedure, advising the chair about the proposed rules, the Committee predicted as much:

Lawyers and even judges may lag in coming to recognize and understand new rules provisions. Means to encourage understanding and thoughtful implementation are always useful. Finding effective means to bring these new rules into effective practice will be important.

The Federal Judicial Center takes the lead in creating educational programs for judges, and will be ready if the proposed changes are adopted.

There may be new ways in which the Committees can encourage the development of programs to educate the bar in the new rules.

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169. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

170. Another recognized area of confusion involving amended Rule 37(e) revolves around the relationship between the federal judiciary's inherent authority to manage litigation in its courts and the amended rule's required findings before courts may order severe sanctions. *See, e.g.*, Kravitz Memorandum, *supra* note 21, at 14. Rather than analyzing the issues surrounding some courts' continued use of inherent authority, however, this article focuses on egregious interpretations of the amended rule that render its changes meaningless and on cases clearly covered by the amended rule but that, nevertheless, ignore its existence altogether.

171. *See, e.g.*, Advisory Committee on Civil Rules, Meeting Minutes 45 (Oct. 30, 2014) ("Experience shows that simply adopting new rules does not automatically transfer into prompt implementation in practice.").

It might help to prepare descriptive materials that can be used by groups that offer continuing education, bar groups, Circuit conferences, Inns of Court, and others.<sup>172</sup>

These are helpful suggestions and, as the discussion in this paper illustrates, ongoing education is still needed. Bar associations and interested groups, like the Sedona Conference, should consider holding continuing education events for lawyers and judges to make sure that relevant parties are aware of amended Rule 37(e)'s broad application in cases involving both lost and spoliated ESI.

Writing about the 2015 amendments to the federal rules, scholars have opined that "the rules amendment process is unlikely to yield significant changes to the Federal Rules of Civil Procedure (for better or for worse)."<sup>173</sup> It is not terribly surprising when the lack of change results from the Committee's failure to enact significant changes or from Congress's inability to legislate around important procedural issues. But when significant changes happen, like the changes made to Rule 37(e), both litigants and courts must recognize a federal rule of procedure is on point and should be applied. Failing to recognize and apply such a rule undermines the federal rules as a whole, the predictability of laws, and the rule of law more generally. As Chief Justice Roberts cautioned in his 2015 Year-End Report commenting on the Duke Rules Package, Rule 1's goal of a "just, speedy, and inexpensive determination of every action and proceeding," requires the "entire legal community, including the bench, bar, and legal academy, [to] step up to the challenge of making a real change."<sup>174</sup> This need continues, and this article hopes to bring attention to that fact.

Regarding the amended rule's relationship with the pre-existing common law, the amended rule governs to the extent the two are in conflict. First-year law students know laws are subject to hierarchies. When in conflict, statutes prevail over common-law rules. While the Federal Rules of Civil Procedure are distinct from federal statutes, their source of authority is statutory.<sup>175</sup> The Rules Enabling Act delegates to the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts," as long as those rules do "not abridge, enlarge or modify any substantive right."<sup>176</sup> Under the Rules Enabling Act, Congress vested the Supreme Court with the authority to enact rules governing procedures before the Court. The Supreme Court then delegated the rule drafting tasks to the Committee. That Committee is the one that proposed the amendment to Rule 37(e), which the Supreme Court enacted in 2015. Because the amended Rule 37(e) was promulgated pursuant to the Rules Enabling

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172. Campbell Memorandum, *supra* note 24, at 13.

173. Steinman, *supra* note 44, at 5.

174. ROBERTS, *supra* note 8, at 9.

175. See Rules Enabling Act, 28 U.S.C. § 2072 (2018).

176. *Id.*

Act and it does “not abridge, enlarge, or modify any substantive right,” it should be treated as statutory and preempt federal common law that interprets the original rule in ways that conflict with the amended rule. Thus, courts that rely on the common law that developed around the original Rule 37(e)’s shortcomings without applying amended Rule 37(e) are applying the wrong law.

Indeed, the current version of the Federal Rules of Civil Procedure apply to all civil actions filed in the federal district courts in this country. Rule 1 of the Federal Rules of Civil Procedure clearly states: “These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.”<sup>177</sup> The Supreme Court has declared that the federal rules are “as binding as any statute duly enacted by Congress.”<sup>178</sup> As a result, “federal courts have no more discretion to disregard the Rule[s]’ mandate than they do to disregard constitutional or statutory provisions.”<sup>179</sup> Courts that disregard the federal rules, therefore, are acting at odds with the Rules Enabling Act.

These courts also undermine Congress’s central goal of procedural “uniformity in the federal courts.”<sup>180</sup> One of the policies underlying the adoption of amended Rule 37(e) was promotion of uniformity and the elimination of conflicts among circuit courts regarding how and when sanctions should be applied in federal courts when ESI is lost or spoliated.<sup>181</sup> Those conflicts were exacerbated by the original rule that was overly narrow and provided little guidance. As a result, parties engaged in wasteful over preservation, incurring unnecessary and sometimes exorbitant expenses. The Committee, therefore, enacted sweeping changes to the rule to address these problems. But when courts and litigants construe the amended rules in ways that ignore the sweeping changes implemented or when they ignore the existence of the rule altogether, the Committee’s efforts are rendered for naught. Courts and litigants must therefore recognize the changes in the federal rules governing ESI that has been lost or spoliated after a duty to preserve has arisen. In doing so, they will promote the development of consistent law around amended Rule 37(e).

In addition, several legal authorities mandate an affirmative ethical obligation for lawyers to competently research and analyze the applicable law. For example, the Model Rules of Professional Conduct (the Model Rules) state, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representa-

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177. FED. R. CIV. P. 1. Among other things, Rule 81 outlines particular types of proceedings to which the rules do not apply, like prize proceedings, bankruptcy proceedings, citizenship cases, special writs, subpoena proceedings, and listed administrative proceedings, and makes clear the rule applies to actions removed from a state court. *Id.* 81.

178. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988).

179. *Id.*

180. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

181. *See discussion supra* Part II.C.



tion.”<sup>182</sup> Indeed, this requirement of competent representation is set forth not only in the Model Rules but in the preamble as well, which is intended to provide the “general orientation” to the Model Rules.<sup>183</sup> The comments to the Model Rules clarify that analyzing precedent is a minimal obligation of competence in all cases and that competence also requires attorneys to keep “abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . .”<sup>184</sup> Moreover, while Rule 11 of the Federal Rules of Civil Procedure does not apply to discovery, the rule reflects the expectation that lawyers will make inquiries reasonable under the circumstances in their representation of clients in federal courts.<sup>185</sup>

This affirmative obligation to competently research, identify, and analyze applicable law is virtually uncontroverted. To advocate effectively, lawyers must be able to research competently and “recognize the existence of pertinent legal authorities.”<sup>186</sup> “The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.”<sup>187</sup> Where, as in the cases discussed in this article, there exists an applicable Federal Rule of Civil Procedure, it is difficult to conclude that a lawyer who fails to cite that rule is meeting his or her ethical obligations.

The Model Rules also prohibit lawyers from misusing the discovery process.<sup>188</sup> Indeed, the comments to the Model Rules specifically state lawyers have a duty to avoid obstructive tactics in discovery procedure and reflect the importance of preserving evidence, including ESI, to the litigation process.<sup>189</sup> To the extent the failure to cite amended Rule 37(e) is intentional, lawyers violate this ethical rule.

Finally, while perhaps not directly related to the amended rule, cooperation among lawyers can enhance discovery outcomes and help avoid discovery disputes.<sup>190</sup> Lawyers who engage with one another in a spirit of cooperation further the objectives of Rule 1 of the Federal Rules of Civil

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182. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2019).

183. *Id.* Preamble & Scope ¶¶ 4, 21.

184. *Id.* r. 1.1 cmt. 8.

185. *See* FED. R. CIV. P. 11(b)(2) (“By presenting to the court a pleading, written motion, or other paper[,], . . . an attorney . . . certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law . . . .”).

186. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 4. The requirement of candor in a code of ethics for lawyers is older than the model rules themselves. Indeed, the 1908 Canons of Professional Ethics, which preceded the adoption of the model rules stated, “It is not candid or fair for the lawyer knowingly to . . . cite as authority a decision that has been overruled, or a statute that has been repealed . . . .” CANONS OF PROF. ETHICS Canon 22 (AM. BAR ASS'N 1908).

187. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 4.

188. *Id.* r. 3.4(d).

189. *Id.* r. 3.4 cmt. 1–2.

190. *See The Sedona Principles, Third Edition*, *supra* note 23, at 76; Stephen S. Gensler, *A Bull's-Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363, 363 (2009).

Procedure by lessening the likelihood of satellite litigation over discovery issues, so the lawyers can instead focus their advocacy skills on the substantive issues raised in a case.<sup>191</sup> If lawyers are cooperating with each other early and often, the opportunity to educate each other on the existence and operation of amended Rule 37(e) will be enhanced.

## V. CONCLUSION

While most courts are properly relying on and citing amended Rule 37(e), this article examines a troubling number that are not. The cases fit squarely within amended Rule 37(e)'s parameters and are unambiguously governed by its explicit guidelines. Yet, remarkably, the courts fail to follow the amended rule's requirements. If followed, these cases would reinforce certain conflicts regarding the appropriate standards for culpability necessary to support severe spoliation sanctions and could render the amended rule as unsuccessful as the rule it replaced.

Original Rule 37(e)'s limitations caused litigants and courts alike to regularly ignore it. Thus, it was hardly surprising that courts and commentators quickly concluded original Rule 37(e) did not work as intended or that the common law that developed around the original rule was inconsistent and unpredictable. Nor was it surprising when the Committee decided it was time to study and update the rule in 2010 or when the amended rule went into effect in December of 2015.

With a primary goal of promoting uniformity in the various approaches that had developed around discovery of ESI, the amended rule is broader than the one it replaced. And it is more specific. It includes guidelines that must be applied in situations involving the intentional spoliation of ESI, as well as guidelines that must be applied in situations involving the accidental loss of ESI.<sup>192</sup> The amended rule specifically limits when courts may order severe sanctions for lost ESI, saving those sanctions for situations in which the ESI is lost due to an intent to deprive the other party of its use in litigation.<sup>193</sup> But, at the same time, the amended rule gives courts wide discretion to determine whether remedial measures are needed and what measures would be appropriate in situations involving accidentally lost ESI.<sup>194</sup>

While it is unsurprising that it takes time for judges and lawyers to understand new rules, several years have passed since Rule 37(e) came into law. More than enough time has passed for courts and litigants to understand the amended rule and to apply it in all cases involving ESI that has been lost or spoliated after the duty to preserve it in anticipation of litigation had arisen. Thus, it is surprising and disturbing that, in the

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191. *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 331 (2009).

192. FED. R. CIV. P. 37(e)(2) (delineating available sanctions if a finding is made that the party intended to deprive another of the ESI's use in the litigation).

193. *Id.*

194. *Id.* 37(e)(1).

considerable time that has passed since the amended rule was enacted, a number of courts continue to misapply the amended rule or ignore it altogether.

In all civil cases filed in federal courts, courts and litigants are obligated to follow the Federal Rules of Civil Procedure. Following Rule 37(e) is necessary and consistent with the expectation that laws lead to predictable outcomes. That expectation allows people to reasonably forecast the likely legal consequences that accompany their actions or their failures to act. The Committee understood this expectation when it undertook its efforts to revise Rule 37(e). But the cases that have fundamentally misinterpreted or ignored the amended rule threaten to undermine its efficacy, as well as this fundamental expectation about the way that laws operate.

Courts and litigants should be encouraged to recognize and appropriately apply amended Rule 37(e) to all cases dealing with ESI lost or destroyed after a duty to preserve it in anticipation has arisen. Doing so will benefit both courts and litigants by promoting the development of consistent and predictable standards to fully realize the rule's potential and the tremendous time and effort that went into amending it. Indeed, doing so is vital to avoid exacerbating an already confusing area of law and rendering the amended rule as ineffective as the rule it replaced.